

opportunity to compete.<sup>66</sup> In Kansas, SBC reports that under PM 59-08 (Percent Trouble Report Rate -- DSL) it failed to achieve parity in one of three months from June to August 2000, presumably because "CLECs choose to use non-standard xDSL technologies."<sup>67</sup> It claims that CLECs are choosing to test the limits of technology and, therefore, experience a failure rate that is generally higher than that experienced when operating within the recognized parameters established by the industry.<sup>68</sup>

The Commission should reject this argument. CLECs are not errant players in the telecommunications industry subjecting ILEC facilities to radically new uses outside of normal industry parameters. CLECs do not have the luxury of attempting to build commercial success on the basis of untested technologies. The equipment and services they deploy have been fully tested in real world situations. SBC has provided no evidence supporting its claim that it is the technology that CLECs use that is causing trouble reports on CLEC lines. Accordingly, CLECs are not to blame for SBC's failure to meet parity in quality of loops provided to CLECs. Instead, the obvious interpretation of SBC's performance data is that it is systematically discriminating against CLECs in terms of the quality of loops that it provides to them. This is another reason why the Commission must deny SBC's application for section 271 approval in Kansas and Oklahoma.

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<sup>66</sup> *New York Order*, para. 335.

<sup>67</sup> *Dysart Affidavit*, para. 118, and Attachment Q.

<sup>68</sup> *Dysart Affidavit*, para. 118.

**c. Timeliness of Access to DSL Loop Pre-Ordering and Ordering Information**

SBC did not attain benchmark standards for PM 5.1-01 (Percent Firm Order Confirmation (“FOCs” Relating to xDSL-Capable Loops Returned Within 24 Hours) for manually submitted orders for the last two consecutive months in Oklahoma.<sup>69</sup> In Kansas, SBC failed to achieve parity in one of the last three months.<sup>70</sup>

**4. BRI Loops**

With respect to BRI loops, where there was sufficient activity to obtain performance data, that data suggests that SBC has provided CLECs loops of lesser quality than it provides to itself. In Oklahoma, the data for PM 59-03 (Percent Trouble Reports Within 30 days — BRI Loops) reflect failure to achieve parity for both of the last two months SBC has results.<sup>71</sup> Also, SBC did not demonstrate parity for one of the last three months for PM 65-03 (Trouble Report Rate — BRI Loops with Test Access). Kansas CLECs were not provided parity in one of three months for PM 59-03 (Percent Trouble Reports Within 30 days — BRI Loops).<sup>72</sup> For the only month in which there was sufficient data to obtain performance measures, data also indicates that for PM 62-04 (Average Delay Days for SBC Missed Due Dates — BRI Loop) SBC did not achieve parity.<sup>73</sup> In fact, SBC caused an average delay for CLECs about a week longer than it

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<sup>69</sup> See Dysart Affidavit, para. 126.

<sup>70</sup> See Dysart Affidavit, para. 126.

<sup>71</sup> See Dysart Affidavit, Attachment P.

<sup>72</sup> See Dysart Affidavit, Attachment Q.

<sup>73</sup> See Dysart Affidavit, Attachment Q.

did for itself for missed due dates in August.<sup>74</sup> Obviously, this means that CLECs will not be able to provide a comparable level of service to their customers as SBC is able to provide to its customers.

### **C. SBC Discriminates in Provision of OSS**

#### **1. Legal Standard**

Under the Competitive Checklist, SBC must provide nondiscriminatory access to OSS.<sup>75</sup> The Commission has previously determined that nondiscriminatory access to the OSS functions and capabilities of pre-ordering, ordering, provisioning, repair and maintenance, and billing (“OSS”) are needed by competitive carriers to deliver local exchange and exchange access services at the level expected by customers.<sup>76</sup> Where there is a retail analogue between OSS functions that a BOC provides itself and a competitor, the BOC must show that the BOC is offering CLECs access to the functions that is “equivalent in terms of quality, accuracy, and timeliness” to what the BOC provides to itself with respect to its retail analog.<sup>77</sup> In the absence of a retail analogue, nondiscriminatory access to OSS requires SBC to provide access “sufficient to allow an efficient competitor a meaningful opportunity to compete.”<sup>78</sup> This is because absent nondiscriminatory access to OSS, competitive carriers do not have a meaningful opportunity to

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<sup>74</sup> Id.

<sup>75</sup> 47 U.S.C. Section 271(c)(2)(B)(ii).

<sup>76</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238, released November 5, 1999, para 425 (“*UNE Remand Order and NPRM*”).

<sup>77</sup> *New York Order* at para. 88.

<sup>78</sup> *New York Order*, para. 86.

compete.<sup>79</sup> Where performance measures exist, the Commission will evaluate whether the access granted is sufficient to afford competitive carriers a meaningful opportunity to compete.<sup>80</sup>

The Commission has determined that competitive carriers need nondiscriminatory access to *all* OSS capabilities and functions.<sup>81</sup> Access to some OSS capabilities and functions, some of the time, does not amount to *full* implementation of the competitive checklist. Nor does access to most OSS capabilities and functions some of the time amount to *full* implementation of the competitive checklist. As explained below, SBC does not provide nondiscriminatory access to all OSS function and capabilities. Therefore, SBC has not fully implemented the competitive checklist in Kansas and Oklahoma, competitive carriers do not have a meaningful opportunity to compete in those states, and the Application must be denied.

## **2. SBC's OSS Performance Data Shows Discrimination Against CLECs**

SBC submits performance data based on performance measures established by the Texas Public Utility Commission. However, the affidavits submitted in support of SBC's application reveal that SBC fails to meet a number of the important operative standards established by the Commission for nondiscriminatory access to OSS.<sup>82</sup> For the most part, like SBC's performance for other items in the competitive checklist, SBC acknowledges that it fails to meet critical performance standards but contends that they do not matter. It asks the Commission to find that

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<sup>79</sup> *Id.* at para. 83; *see also* BellSouth South Carolina Order, 13 FCC Rcd. at 585.

<sup>80</sup> *Texas Order* para 95.

<sup>81</sup> *New York Order* at para. 88.

<sup>82</sup> *See* Dysart Aff. para. 58-72.

it somehow provides nondiscriminatory access to OSS even though its own performance data shows that it does not.

For example, SBC acknowledges that for the 12 consecutive months immediately proceeding its Application it failed to meet performance standard PM 10.1-01( Percent Manual Rejects Received Electronically and Returned Within 5 hours). SBC asserts that this performance “properly viewed” provides CLECs a meaningful opportunity to compete.<sup>83</sup> SBC also states that although it failed to meet this performance standard, the failed performance is better than the failed performance that the Commission approved in the *Texas Order*.<sup>84</sup> Similarly, SBC failed to meet the parity standard in each of the immediately preceding three months for PM 17-01 (Billing Completeness). Here again, SBC essentially argues that although it didn’t meet the standard, it was close enough because the Commission found this performance acceptable in the *Texas Order*.<sup>85</sup>

Allegiance submits that these explanations provide no basis for finding that SBC’s failure to provide parity to CLECs with respect to manual rejects and billing completeness is acceptable. In effect, what SBC is contending is that it is acceptable for it to fail in these measures on a permanent basis. Thus, SBC has provided no statement of how it intends to improve performance concerning these measures such as by submitting a detailed performance improvement plan. Allegiance submits that the Commission should reject this supposition and

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<sup>83</sup> See Dysart Aff. para. 59.

<sup>84</sup> See Dysart Aff. para. 60

<sup>85</sup> See Dysart Aff. para. 65.

find that SBC is engaging in systematic, institutional discrimination against CLECs in provision of OSS based on the record concerning these performance measures in both the Texas application proceeding and this proceeding.

SBC also acknowledges that it failed to meet the parity standard in each of the immediately preceding three months for PM 13-02 (Order Process Percent Flow Through - LEX) in Oklahoma. It attempts to minimize this by comparing its own retail flow through rate with the flow through rate in its five-state region. However, this is not a valid comparison because the parity at issue is between CLECs and SBC's retail operations, not between SBC's Oklahoma and regional performance. Predictably, SBC describes the resulting difference as minor and "not likely to have hindered any Oklahoma CLEC's opportunity to compete."<sup>86</sup> Therefore, SBC has not provided an adequate explanation for its failure to meet parity under this measure.

SBC attempts to discount the discrimination against CLECs in provision of OSS by stating that overall it only "failed to meet the applicable standard for a handful of measures."<sup>87</sup> SBC ignores the fact that the Act mandates nondiscriminatory access to OSS, not almost nondiscriminatory access to OSS. Further, as pointed out, the Commission has "previously determined that nondiscriminatory access to OSS is a prerequisite to the development of meaningful local competition."<sup>88</sup> Allegiance stresses that anything less than complete parity will harm CLEC's ability to compete since customers of competitive carriers, if provided a lesser

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<sup>86</sup> Dysart Aff. para 62,

<sup>87</sup> See Dysart Aff. para. 59.

<sup>88</sup> Texas Order para. 92.

degree of service across a wide spectrum, will inevitably assign blame for the lesser degree of service to the competitive carrier. Less than complete parity materially impairs the ability of competitive carriers to provide the services they seek to offer in the local telecommunications market.

Allegiance recognizes that the Commission stated in the Texas 271 proceeding that it would not withhold Section 271 authorization on the basis of isolated instances of allegedly unfair dealing or discrimination<sup>89</sup> While the Commission has made clear that it also does not expect “perfection” in all aspects of OSS, it is clear that at some point the number of problems, even if each one can be viewed as “relatively small” amount to an inability to provision OSS on a non-discriminatory basis pursuant to Section 271(c)(2)(B)(ii). The number of issues admitted to by SBC in the instant case clearly rise to that level. Therefore, the Commission should reject the application.

#### **D. Hot Cuts**

Another area where SBC must meet performance criteria is the provisioning of unbundled loops through “the use of coordinated conversions of active customers” -- so-called “hot cuts” -- from the BOC to the competing carriers.<sup>90</sup> This involves manually disconnecting the customer’s loop in the BOC’s central office and reconnecting the loop at the competing carrier’s collocation space.<sup>91</sup> Since the customer is taken out of service while the hot cut is in

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<sup>89</sup> *Texas Order* at 431.

<sup>90</sup> *New York Order*, ¶ 291.

<sup>91</sup> *New York Order*, ¶ 291, fn. 925.

progress, it is critical that the hot cut be provisioned correctly and coordinated between the BOC and the competing carrier in order to prevent extended service disruptions for the customer.<sup>92</sup>

The appropriate standard by which to examine performance is whether the BOC provides unbundled loops through hot cuts in a manner that offers a competitor a meaningful opportunity to compete.<sup>93</sup> In Oklahoma, hot cut performance is measured according to the percentage of hot cut loop orders completed within a specified time window. The Oklahoma data, for instance, require fewer than 2% premature disconnects during a hot cut. SBC claims to have “effectively” met or surpassed this 2% benchmark performance level in each of the past 12 months for PM 114-01 (Percent of Premature Disconnects — Coordinated Hot Cuts — LNP).<sup>94</sup> Allegiance is not sure what SBC’s definition of “effectively” is. The data, however, indicate that SBC clearly missed the 2% mark by a wide margin. In June 2000, the percentage of premature disconnects for CLEC hot cuts was a staggering 21%.<sup>95</sup>

CLECs cannot, as a practical matter, compete effectively if a significant percentage of prospective customers experience significant losses of service in the hot cut process, or if other coordination problems occur. In fact, the Commission recognized the central importance of hot cuts when it noted in the *New York Order* that:

We are especially concerned with hot cut performance because of the substantial risk that an untimely or defective cutover will result in an end-user customer’s loss of service for more than a brief

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<sup>92</sup> *Id.*

<sup>93</sup> Texas Order, para. 258; New York Order, para 291.

<sup>94</sup> Dysart Affidavit at para. 143.

<sup>95</sup> See Dysart Affidavit, Attachment Q.

period, as well as the effect of such disruptions upon competitors. We also would be particularly concerned if there was any evidence that [a BOC] is competing in the market place in part by suggesting to consumers that there is a possibility of service disruptions when customers switch their service from [a BOC] to competing carriers.<sup>96</sup>

With regard to SBC's Texas application, the Department of Justice concluded that "SBC's performance with regard to hot cuts is worse than Bell Atlantic's performance in New York, which the Commission concluded was 'minimally acceptable.'"<sup>97</sup> SBC has failed to show that its hot cut performance in Oklahoma meets this standard.

#### **IV. SBC HAS NOT IMPLEMENTED ACCESS TO LOOP PREQUALIFICATION INFORMATION**

The Commission must evaluate SBC's compliance with the loop prequalification requirements established in the *UNE Remand Order*. The *UNE Remand Order* required ILECs as part of the OSS pre-ordering process, to provide CLECs with nondiscriminatory access to the same detailed information about the loop that is available to the incumbent, so that the CLEC can make an independent judgment about whether the loop is capable of supporting the advanced services equipment the CLEC intends to install.<sup>98</sup> It is not clear that SBC has made loop prequalification information available to CLECs or developed or proposed performance metrics to satisfy this key requirement.

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<sup>96</sup> Bell Atlantic *New York Order*, ¶ 309.

<sup>97</sup> United States Department of Justice Evaluation ("DOJ Evaluation"), in CC Docket 00-65, p. 27.

<sup>98</sup> UNE Remand Order, para. 427.

Significantly, SBC's prequalification database provides a "green, yellow or red" indicator which is a graphical summation of the data contained in the database.<sup>99</sup> The Commission has already determined that the database used by SBC to provide loop qualification information would not meet the nondiscrimination requirement because it "indicates only whether a loop falls into a 'green, yellow, or red' category" and does not provide access to the underlying loop information.<sup>100</sup> At the pre-ordering stage, CLECs need loop qualification information to identify the physical attributes of the loop plant (such as loop length, the presence of analog load coils and bridge taps, and the presence and type of digital loop carrier systems), because it enables carriers to determine whether the loop is capable of supporting varieties of DSL and other advanced services.<sup>101</sup>

The Commission did not evaluate SBC's compliance with the *UNE Remand Order* requirements in connection with SBC's Texas 271 application submitted April 5, 2000 because those requirements were not in effect when that application was filed, but must do so here. In the *Texas Order*, the Commission stated that it would "evaluate BOC compliance with the regulatory requirements in place on the date of its section 271 filing," and did not consider whether SBC complied with the new loop requirements in the *UNE Remand Order* that took effect on May 18, 2000.<sup>102</sup> Those requirements are currently in place and the Commission has already acknowledged that access to loop prequalification information is critical to CLECs' ability to

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<sup>99</sup> Chapman Affidavit, paras. 22, 24-28. *See also*, Nolan/Smith Affidavit, para. 141.

<sup>100</sup> *UNE Remand Order*, para. 428.

<sup>101</sup> *Id.* para. 426.

compete successfully. Nor is it clear that provision of designed loop information instead of actual loop information complies with the Commission's requirements.<sup>103</sup> Thus, the Commission should reject SBC's application for interLATA authority in Kansas and Oklahoma solely on the basis of SBC's failure to provide CLECs with the required loop prequalification information identified in the *UNE Remand Order*. Moreover, the Commission should consider prohibiting SBC from providing DSL services until it provides an adequate demonstration of being able to provide nondiscriminatory access to loops, a step recently taken by the Wisconsin Public Service Commission.<sup>104</sup>

**V. IF THE COMMISSION GRANTS THE APPLICATION, SUPPLEMENTAL COMPETITIVE SAFEGUARDS MUST BE ESTABLISHED**

**A. Strengthened Backsliding Measures**

The Commission considered backsliding measures in both the New York and the Texas proceedings as part of its public interest analysis.<sup>105</sup> In New York and Texas the Commission found that the performance monitoring and enforcement mechanisms in place "in combination with other factors" provided sufficient assurance that the local market would remain open after Bell Atlantic received Section 271 authorization.<sup>106</sup> In New York the Commission relied heavily

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<sup>102</sup> *Texas Order*, para. 165.

<sup>103</sup> See Affidavit of Elizabeth Ham, p. 62.

<sup>104</sup> *Investigation of the Digital Services and Facilities of Wisconsin Bell, Inc.*, 6720-TI-154/7825-TI-100, Final Decision and Certificate, p. 24.

<sup>105</sup> *New York Order* at 429-43; *Texas Order* at 422-30.

<sup>106</sup> *New York Order* at 429.

upon the fact that the performance monitoring and enforcement mechanisms contained the following attributes:

- potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;
- clearly articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier to carrier performance
- a reasonable structure that is designed to detect and sanction poor performance when it occurs;
- a self executing mechanism that does not leave the door open unreasonably to litigation and appeal;
- and reasonable assurances that the reported data is accurate.<sup>107</sup>

In New York the Commission found that because there was a total of \$269 million in potential bill credits at risk on an annual basis there was a “meaningful incentive for Bell Atlantic to maintain a high level of performance.”<sup>108</sup> The Commission based its conclusion, in part upon the fact that the \$269 million represented approximately 36 percent of the net return of \$743 million reported for 1998 in New York. The Commission accepted the New York plan because it found that it was “reasonably self-executing.”<sup>109</sup>

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<sup>107</sup> *Id.* at para. 433.

<sup>108</sup> *Id.* at para. 436.

<sup>109</sup> *Id.* at para. 441. While the Commission recognized that any “exceptions” or “waiver” process could effectively destroy the self-executing aspect of any plan it found that the three exceptions/waivers allowed in New York appeared to be generally reasonable and the New York Commission had stated that it would consider waiver requests only in “limited, extraordinary circumstances.”

In the Texas 271 Order the Commission relied upon reasoning and analysis similar to that it had used in New York in finding that SBC's performance remedy plan provided assurance that the local market would remain open after SBC received interLATA authority. As in New York, the Commission found that the total of \$289 million in potential penalties placed at risk, on an annual basis "represents a meaningful incentive for SBC to maintain a high level of performance. As in New York this figure represented approximately 36 percent of SBC's net return.

In the instant application, SBC states that it has in place "performance measurements covering all aspects of [the] provisioning of services and facilities to CLECs", that the measurements were developed in a collaborative process, and that it "has proposed a performance penalty plan that mirrors the Texas plan in all material respects."<sup>110</sup> Further, it alleges that SBC's region-wide data collection methods and procedures have passed an independent third-party analysis under the direction of the Texas PUC.<sup>111</sup> SBC states that its proposed payment plan involves both self-executing payments to the Kansas and Oklahoma state treasuries as well as to CLECs and the plan includes a two tiered payment scheme and increased assessments for substandard performance on certain measures affecting nascent services.<sup>112</sup> The plan, according to SBC puts \$45 million at risk during the first year in Kansas and \$44 million at risk in Oklahoma, which SBC alleges is "virtually the same liability" - measured as a percentage of net return - that was approved in Texas and New York."<sup>113</sup> SBC generally argues that because

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<sup>110</sup> Brief in Support of Application at 63-64.

<sup>111</sup> *Id.* at 66.

<sup>112</sup> *Id.* at 67.

<sup>113</sup> *Id.*

the FCC approved the Texas performance measures and performance penalty plan the Commission must do so in this case.

For the reasons discussed below, the Commission should reject the Kansas and Oklahoma proposed performance penalty plan for a number of reasons and establish significantly stronger backsliding measures. First, it is not at all clear that the Kansas and Oklahoma penalty plans satisfy the requirements articulated by the Commission for the plans accepted in New York and Texas. Second, experience has shown that, in fact, the approach accepted in New York and Texas is not sufficient to deter backsliding. The Commission is well aware that there has been significant backsliding in New York. Therefore, even if the Oklahoma and Kansas plans were as strong as New York or Texas, the Commission should recognize that those plans were not sufficient and stronger plans should now be adopted.

**1. The Proposed Plans for Oklahoma and Kansas Are not Necessarily Self-Executing and the Potential Liability is not Meaningful**

As noted above, the Commission accepted the backsliding provisions for New York and Texas based in large part upon its finding that the potential liability provided a meaningful and significant incentive to comply with the designated performance standards and upon its finding that the provisions were self-executing. It is not at all clear that either of these standards are met in the Kansas and Oklahoma plans.

SBC's argument that the proposed potential liability provides a meaningful and significant incentive to comply is based entirely upon the fact that the potential liability in New York and Texas was approximately 36% of the "net return" of each company, which SBC claims is the same percentage at risk in Kansas and Oklahoma. However, the penalties that SBC touts

not only have yearly caps but monthly caps that are quite low. The monthly cap in Kansas, for example, is \$3.75 million. With a monthly cap that low, it would be quite easy for SBC to obliterate all competition in Kansas within several months (and for only about 10 million dollars). That is an extremely small sum for a business the size of SBC. While Allegiance recognizes that the Texas performance remedy plan also contained monthly caps, the Commission did not expressly consider those caps. And, in any event the existence of monthly caps in Kansas and Oklahoma, where competition is clearly less established than in Texas, could have a much greater detrimental effect on competition.<sup>114</sup>

In addition, the automatic penalties come into play only if SBC fails to meet the articulated standards for three months in a row. Thus, it would be entirely possible for SBC to provision services to competitive providers at a rate that is far from parity for two months and then meet the performance standards for one month and then start the process over again by failing to meet the performance measures for the next two months and, again, on the third (or sixth) month improving performance significantly again. If SBC were to do that it could easily destroy the nascent competitive market in Oklahoma and Kansas and never pay a penny in fines.<sup>115</sup>

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<sup>114</sup> The plan also contains a Single CLEC monthly cap of \$470,000 in Kansas and \$459,000 in Oklahoma. Such caps are particularly inappropriate in any state where there is not a competitive presence by a large number of CLECs. The incumbent could "pick off" its competitors one by one for a relatively small amount.

<sup>115</sup> It is already clear that SBC's performance seems to go up and down significantly depending upon the month. There are a number of performance measures for which SBC states that it has met the applicable standard for one or two of the past three months. If an ILEC is allowed to bounce between acceptable and unacceptable performance the effect on the CLECs could be disastrous with no penalty ever accruing to the incumbent.

It is also not clear that the penalties will be “self-executing.” The performance remedy plan in both Oklahoma and Kansas provide that SBC will not be liable for the payment of either Tier 1 damages or Tier 2 assessments until the Commission approves an Interconnection Agreement between a CLEC and SBC containing the terms of [the performance remedy plan].” Therefore, it is not entirely clear that the supposedly self-executing remedies will in fact become applicable.

Further, while SBC argues that the performance remedy plan in Kansas and Oklahoma mirrors the Texas plan in all material aspects, it is not clear that that is correct. The plans appear to be far from identical. For example, there appear to be differences in the “Z-test,” which is used to evaluate the difference between the two means (SBC and CLEC), or percentages, or the difference in the two proportions reported. In addition, the Texas provision relating to when SBC would be liable for payment of damages appears to be somewhat more self-executing or more likely to become effective than the provisions in Kansas or Oklahoma (compare Section 5.5 of the Texas Performance Plan and Section 5.5 of the Kansas plan).

Finally, the New York Commission had stated that it would consider waiver requests of penalty provisions only in “limited, extraordinary circumstances.” While the exceptions and waivers that are proposed in Kansas and Oklahoma are similar to those in New York, in the instant case there does not appear to be a similar assurance by Kansas or Oklahoma commissions that the exceptions and waivers would be considered only in “limited, extraordinary circumstances.” Therefore, it is far from clear that the performance penalties would be imposed in Kansas and Oklahoma.

**2. Experience has Shown that the New York Backsliding Measures Did not Prevent Significant Backsliding**

As the Commission knows, experience has shown that the backsliding measures that were accepted in the New York proceeding have proven to be insufficient. On February 7, 2000, this Commission commenced an investigation into Bell Atlantic New York's potential violations of Section 271 in connection with lost or mishandled orders submitted by its local service competitors. The Commission found:

Evidence submitted by Bell Atlantic in this investigation suggests that Bell Atlantic's performance in providing order acknowledgments, confirmation and rejection notices, and order completion notices for UNE-Platform local service orders deteriorated following Bell Atlantic's entry into the New York long distance market. Data submitted by Bell Atlantic indicates that the problem appears most acute for January and February of this year. Specifically, Bell Atlantic indicates that it received trouble tickets from competing carriers in November 1999 regarding 33,000 orders; 60,000 in December 1999, and more than 86,000 in January 2000. For the first eleven days of February 2000, Bell Atlantic reports receiving trouble tickets regarding another 48,000.<sup>116</sup>

The number of affected orders was astounding. Based on this terrible OSS performance, Bell Atlantic was required to enter into a consent decree with the Commission and make a contribution of \$3,000,000 to the U.S. Treasury and the NY PSC ordered Bell Atlantic to make \$10 million in rebates to competitors because of electronic ordering problems.<sup>117</sup> Thus, the Commission simply erred when it reached its "predictive judgment" that the Bell Atlantic-New

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<sup>116</sup> Bell Atlantic-New York Authorization Under Section 271 of the Communications Act, to provide In-Region, InterLATA Service in the State of New York, Order, FCC 00-92, 15 FCC Rcd. 5413 at ¶ 7 ("March 9, 2000").

<sup>117</sup> *FCC Decides BA Has Satisfied OSS Requirements in N.Y. State*, Communications Daily, Vol. 20, No. 120, June 21, 2000 at p. 2.

York backsliding provisions would be sufficient to deter backsliding.<sup>118</sup> Even assuming that the current approach is possibly sufficient to prevent continuation of long lapses in compliance, it is manifestly not sufficient to prevent backsliding in the first instance since this has occurred. And, this backsliding causes immediate, long lasting harm to CLECs even if it is ultimately corrected. Therefore, the Commission should adopt measures that deter backsliding from occurring in the first place.

Further, strengthened backsliding measures are appropriate for this Application because there is so little experience on which to base an evaluation of SBC's performance in Oklahoma and Kansas. For example, a review of the Dysart affidavit illustrates that there are a significant number of performance measures for which there have been insufficient CLEC orders to result in meaningful performance assessments, including the key measure of provision of unbundled loops.<sup>119</sup> Obviously, extensive evidence of compliance over a long period of time provides a higher degree of confidence of future performance than does little data, and that over a brief period of time. Allegiance submits that where, as here, there is little information on which to base an evaluation of performance, the importance of establishing significantly greater performance penalties is magnified. Moreover, where there is a lesser degree of competition, as in Kansas and Oklahoma, the impact of backsliding may be more harmful to competition than

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<sup>118</sup> See New York Order at ¶ 433. The Commission itself recently released information that clearly demonstrates that Verizon's performance on some of the major market opening measures has declined since Verizon was granted Section 271 authority in New York. *See March 9, 2000 Order*. The Commission should also recognize that the backsliding in relation to the New York 271 is not an isolated occurrence. There were a number of commitments that Bell Atlantic made in order to secure approval for its merger with NYNEX with which the merged companies did not comply, including commitments relating to the adoption of uniform OSS interfaces.

<sup>119</sup> *See, e.g.* Brief in Support of Application at 95 ("there were insufficient orders to allow statistically significant results for any loop type over the past three months").

where there is robust competition. The extent of competitive entry in Kansas and Oklahoma appears to be minimally sufficient to warrant evaluation of the Application under "Track A," but it is hardly sufficient to give the Commission great comfort that competitive entry is strong enough to withstand poor performance by the incumbents.<sup>120</sup> Accordingly, the Commission should establish strengthened backsliding measures.

### **3. Proposed Additional Anti-Backsliding Measures**

Because the backsliding protections proposed in Kansas and Oklahoma are not sufficient to prevent discriminatory and anti-competitive actions such as those that occurred in New York the Commission should adopt additional measures. Competitive carriers have previously asked the Commission to adopt such procedures, but the Commission refused because it believed that it had sufficiently set forth its views on Backsliding in the New York 271

Allegiance has previously asked the Commission to adopt strengthened backsliding measures. The Commission declined to do so on the ground that anti-backsliding measures adopted in the New York 271 proceeding were sufficient.<sup>121</sup> Now that those views have proven to be overly optimistic, Commission should adopt stronger anti-backsliding provisions.

At a minimum, the Commission should adopt the following provisions:

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<sup>120</sup> The application attempts to argue that the level of competition in both Kansas and Oklahoma is similar to the level of competition in Texas. See Affidavit of J. Gary Smith and Mark Johnson at 7. However, the applicants readily admit that their comparison is between the level of competition in Kansas and Oklahoma as of the time of the filing of the application and the filing of the first application in Texas, almost a year ago and more than four months before the filing of the Texas application that was eventually granted. In addition, in Oklahoma, the number of CLEC access lines is below the number of access lines reported for Texas in all three of the categories reported and in Kansas the number of lines is below the number for Texas in one the three categories. *See id.* ]

<sup>121</sup> See *Petition of Allegiance Telecom, Inc., In re the Development of a National Framework to Detect and Deter Backsliding*, Rm 9474, (Order (released Jan. 19, 2000)).

1. Any penalties should be payable if the incumbent fails to meet the applicable standards for three months in a row or for three out of five months.
2. Monthly caps should not be limited to 1/12 of the yearly cap. Rather they should be limited to 1/4 or 1/3 of the yearly cap.
3. There should be no single CLEC caps
4. There should be a several-tiered approach whereby the remedies would be increased to ensure that the pressure to incent the RBOCs to comply with the 271 obligations and commitments increase with time.

While Allegiance continues to believe that the Application should not be granted, adoption of these additional backsliding measures would give competitive carriers and the public better assurance that the markets in Oklahoma and Kansas will not become more closed in the future

#### **B. The Commission Should Establish A Fresh Look Opportunity**

In the *Pricing Flexibility Order*, the Commission stated that “[t]o the extent the [ILEC] can lock in the larger business customers whose traffic would economically justify the construction of new facilities, the [ILEC] can foreclose competition ...”<sup>122</sup> and that “[a]n incumbent can forestall the entry of potential competitors by ‘locking up’ large customers ...” In the *Bell Atlantic 271 Order*, the Commission further recognized that the application of penalties when a customer terminates a contract in order to take service from another provider could, in

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<sup>122</sup> *Access Charge Reform, et al.*, Fifth Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, CC Docket No. 94-1, CCB/CPD File No. 98-63, CC Docket No. 98-157, (rel. August 27, 1999) (“*Access Charge Reform Order*”), ¶ 79.

certain circumstances, be unreasonable or anticompetitive.<sup>123</sup> The Commission determined that the termination penalties brought to its attention in that proceeding “on their face” would not result in a carrier’s noncompliance with the competitive checklist.<sup>124</sup> However, the Commission determined that “issues raised by parties in this proceeding relating to contract termination liability are more *appropriately resolved* in the context of a petition for declaratory ruling filed by KMC Telecom, Inc.,<sup>125</sup> and we thus decline to resolve the issue in this proceeding.”<sup>126</sup>

Since that determination, CLECs have continued to experience difficulties in providing competitive services because ILECs impose significant termination liability on customers.<sup>127</sup> In many cases, these termination penalties were imposed before the customer had any competitive choice. In addition, ILECs substantially increased use of termination penalties right before and after passage of the Telecommunications Act of 1996 in order to protect against CLECs offering their customers better service at lower prices.<sup>128</sup> Accordingly, as recognized by the Commission,

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<sup>123</sup> Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, CC Docket No. 99-295, FCC 99-404, Memorandum Opinion and Order, (rel. December. 22, 1999), (“Bell Atlantic 271 Order”), ¶ 390.

<sup>124</sup> *Bell Atlantic 271 Order* at ¶ 386.

<sup>125</sup> The Establishment of Rules to Prohibit the Imposition of Unjust, Onerous Termination Penalties on Customers Choosing to Partake of the Benefits of Local Exchange Telecommunications Competition, KMC Telecom Inc. Petition for Declaratory Ruling, CC Docket No. 99-142 (filed April 26, 1999).

<sup>126</sup> *Bell Atlantic 271 Order*, ¶ 390.

<sup>127</sup> See Letter from KMC Telecom Inc., CC Docket No. 99-142, February 8, 2000; Letter from Mpower Communications Corp., CC Docket Not. 99-142, June 5, 2000.

<sup>128</sup> See e.g. Letter from Mpower Communications Corp., CC Docket No. 99-142, June 5, 2000 citing GTE Florida’s Responses to Staff’s Data Request On Fresh Look Policy, Docket No. 980253-TX, Florida Public Service Commission, filed April 29, 1999, “Number of Outstanding Eligible Tariffed Term Plans by Quarters;” BellSouth Response to Staff Fresh Look Data Request, Docket No. 980253-TX, Florida Public Service Commission filed April 30, 1999, “Number of Outstanding Eligible Tariffed Term Plans by Quarters.”

these termination penalties are inimical to the pro-competitive goals of the Act and are contrary to the public interest. Further, a BOC that employs unreasonable termination penalties has not adequately opened its markets to competition and is disqualified from interLATA entry.

Because the Commission has so far failed to act on the KMC petition, as it said it would do, Allegiance urges the Commission to take advantage of this Application to establish a fresh look opportunity for SBC customers in long term service contracts, if the Commission grants the Application. This will remove termination penalties as a barrier to entry in Oklahoma and Kansas. Specifically, the Commission should determine that termination penalties equivalent to the full tariff or contract price are unreasonable and have the effect of prohibiting the provision of telecommunications service by competitors to customers.

#### **VI. SBC HAS NOT PROVIDED ADEQUATE NOTICE OF SECTION 271 ISSUES IN OKLAHOMA AND KANSAS**

SBC has not complied with some of the substantive and filing requirements that the Commission articulated in its *Section 271 Public Notice* of September 28, 1999.<sup>129</sup> There, the Commission required all applicants to submit “a statement describing the efforts the applicant has made to meet with likely objectors to narrow the issues in dispute and the results of those efforts.” The Commission stated that the statement could either be in the Brief in Support or

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<sup>129</sup> Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act, Public Notice, DA-99-1994, rel. September 28, 1999.

filed separately from the application but not later than five days after the filing of the application.<sup>130</sup>

SBC has responded to this requirement with a footnote on page 3 of its brief in support of the Application that simply states “[T]hroughout the course of these proceedings, SBC has continued to work with all interested parties (including the KCC, the OCC, DOJ, and competing carriers) in the context of formal proceedings, informal collaborations, and individual discussions to attempt to resolve disputed issues.” This statement is clearly not sufficient to satisfy the Commission’s requirements. The Commission’s requirements articulated in the Public Notice and in the subsequent New York Proceeding clearly were adopted in order to ensure that all issues would be aired as soon as possible in the Section 271 process and to ensure that there is no undue advantage for the applicant which could otherwise preempt the ability of interested parties to respond to arguments that the applicant could raise in response to an issue that was existent but not raised until the filing of Comments by interested parties. As the Commission has noted many times it has a statutory obligation to rule on Section 271 applications in 90 days. It is imperative therefore, that the review process be as efficient and fair as possible. The fact that SBC has not attempted to advise the Commission of the issues that it believes may be raised may result in the Commission having less than a full record before it when has to rule on this application in just a few weeks.

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<sup>130</sup> Subsequent to the release of the September 28<sup>th</sup> Public Notice the Commission in the New York 271 proceeding, stated. We do not expect that a BOC, in its initial application, will anticipate and address every foreseeable argument its opponents might make in their subsequent reply comments, but we have previously stated that a BOC must address in its initial application all facts that the BOC can reasonable anticipate will be at issue. Through state proceedings, BOCs should be able reasonably to identify and anticipate certain arguments and allegations that parties will make in their filings before the Commission.

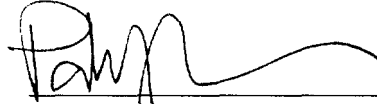
**VII. THE COMMISSION SHOULD REQUIRE ALL APPLICATION AND SUPPORTING DOCUMENTS TO BE POSTED ON THE APPLICANT'S WEBSITE**

Allegiance notes that it has been very difficult to adequately review the instant application because so much of what was submitted is not available on SBC's website. In the future, to the extent that the applying BOC does not do so voluntarily, the Commission should require any applicant to place the entire application including all supporting documents, in an easily accessible area of the applicant's website. Simply filing 47 boxes of material at the Commission is not sufficient and puts a significant burden on interested parties. Obviously, many of the persons who might be interested in a Section 271 application will be in the state in which the application applies and will not have the ability to travel to Washington. It would be a very modest burden on the applicant to require the placement of supporting documentation on a website. Allegiance suggests that the Commission require, at a minimum, the placement on the applicant's website of (1) the major State Commission orders or similar documents relative to the application, (2) copies of any relevant documents from the State Attorney General or state consumer advocate; (3) copies of any performance remedy plan or similar plan; (4) attachments to all affidavits; and (5) the statement of generally available terms (SGAT) of interconnection under Section 252 of the Act.

### VIII. CONCLUSION

For the foregoing reasons, the Commission should deny SBC's Application for Section 271 authority in Oklahoma and Kansas.

Respectfully submitted,



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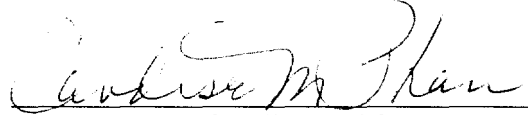
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Dated: November 15, 2000

## CERTIFICATE OF SERVICE

I, Candise M. Pharr hereby certify that the foregoing Comments of Allegiance Telecom, Inc. were filed this 15th day of November, 2000 and copies of same were sent via hand delivery and/or first class mail upon the following:

  
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